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No.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

ABBEY NURSING HOME, INC.,
AND MAX A. STRAUSS,

PETITIONERS

-vs-

ESTATE OF ALMA RICHARDSON,
VERNEDA BENTLEY, ADMINISTRATRIX,

RESPONDENT

ON WRIT OF CERTIORARI
TO THE OHIO EIGHTH DISTRICT
COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is it a violation of Article VI, Cl. 2, the "Supremacy Clause" of the Constitution of the United States, for a state, through its courts, to refuse to enforce Federal statutory law, specifically the subrogation provisions of 42 U.S.C. §1396a(a)(25)(C), found in Title XIX of the Social Security Act, by refusing to give effect to the state statute carrying out the requirements of Federal law, in this case, O.R.C. §5101.58?

2. Where, in a civil case, the courts of a state deny a party thereto the benefit of those well-settled statutory and common-law rules governing substantive proof and trial procedure which are ordinarily and regularly applied in similar disputes before such courts, does such state action constitute a denial of that party's rights under the Fourteenth Amendment to the

Constitution of the United States, to Due Process of Law and Equal Protection of the Laws?

3. Where this Court has decided that in cases seeking redress for alleged violations of an individual's liberty interest in safety in an institution supported by Federal funds, a decision regarding such safety, if made by a professional (which includes a person competent, whether by education, training, or experience, to make the particular decision at issue) is presumptively valid and liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards, as to demonstrate that the person responsible actually did not base the decision on such a judgment, may a state court impose such liability without first requiring proof of (a) the accepted professional judgment, practice, or standard, and (b) the departure therefrom?

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OPINIONS BELOW

Denial of Motion to Certify in the
Supreme Court of Ohio
Ohio Supreme Court Case No. 84-711
September 12, 1984

Denial of Motion for Rehearing in the
Supreme Court of Ohio
Ohio Supreme Court Case No. 84-264
May 23, 1984

Denial of Motion to Certify in the
Supreme Court of Ohio
Ohio Supreme Court Case No. 84-264
April 18, 1984

Estate of Alma Richardson,
Verneda Bentley, Administratrix
Ohio Eighth District Court of Appeals
Cuyahoga County, Unreported, Case No. 46126
May 7, 1984

Estate of Alma Richardson,
Verneda Bentley, Administratrix
Ohio Eighth District Court of Appeals
Cuyahoga County, Unreported, Case No. 46126
December 19, 1983

Denial of Motion to Certify in the
Supreme Court of Ohio
Ohio Supreme Court Case Nos. 81-1453, 81-1454
November 25, 1981

Estate of Alma Richardson,
Verneda Bentley, Administratrix
Ohio Eighth District Court of Appeals
Cuyahoga County, Unreported,
Case Nos. 42156 and 42168 (Consolidated)
July 9, 1981

JURISDICTIONAL STATEMENT

The date of the judgment or decree of the Ohio Supreme Court sought to be reviewed is September 12, 1984. The dates of the judgments or decrees rendered in the Ohio Court of Appeals are December 19, 1983, as amended on March 7, 1984.

The statutory provision believed to confer upon this Court jurisdiction to review the judgment or decree in question by Writ of **Certiorari** is 28 U.S.C. §1257(3), which permits review of final judgments rendered by the highest court of a state in which a decision could be had, where the validity of a statute of the United States is drawn into question, and where a right is claimed under the Constitution and statutes of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the application of Article VI, Cl. 2 of the United States Constitution, the "Supremacy Clause", which provides:

> The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

This case further involves the application of the Due Process and Equal Protection clauses of Amendment XIV to the Constitution of the United States, which provide, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Finally, this case involves the application and enforceability by state courts of 42 U.S.C. §1396a(a)(25), which is set forth in the Appendix hereof at Exhibit S.

STATEMENT OF THE CASE

On June 1, 1974, defendant, Abbey Nursing Home, Inc. ("Abbey"), leased a duly-licensed multi-

story nursing home facility from Midtown Nursing Home at 8205 Euclid Avenue, in Cleveland's inner city. Upon leasing this building, Abbey undertook a comprehensive, $700,000.00, five-year plan to improve and remodel its interior structure. This renovation, done floor by floor, produced dust and routine construction debris in the areas where work was proceeding. Therefore, Abbey moved all patients from floors on which work was proceeding to unoccupied beds on other floors to avoid their exposure to dust. While the construction process made it impossible for Abbey's exterminator to keep the facility insect-free at all times, Abbey increased the frequency of his visits from monthly to weekly in an attempt to do so. Nursing homes in Ohio, such as Abbey, are subject to stringent State regulation and control. (**See**, Ohio Revised Code Annotated [Page's, 1983] Chapter 3721.)

At all times, Abbey employed the number of nursing personnel required by State law. Through these employees, it provided around-the-clock,

residential nursing care and other services to its residents -- three meals and a snack each day, transportation to and from the hospital for clinic appointments, planned social activities, laundry services, social counseling, and various other services. For these services, the State of Ohio paid $23.22 per day for most patients; the bulk of Abbey's residents being supported by Medicaid.

Plaintiff's decedent, Alma Richardson, voluntarily entered Abbey on February 3, 1978, and remained there until June 19, 1978, when her family abruptly removed her. Upon discharge, she was taken by her granddaughter (Ms. Bentley) and her daughter (Mrs. Lee) to the Emergency Room at University Hospital, where she was examined by a young intern, Donald Goodfellow, M.D.

Dr. Goodfellow noted that Mrs. Richardson had a partial paralysis of her left side; a bruise on her left shoulder-upper arm area; two small, superficial abrasions on her left thigh; and a rash, which he likened to diaper rash, beneath her left

breast. Dr. Goodfellow renewed prescriptions for Mrs. Richardson's long-standing illnesses and advised her family to apply warm compresses to the bruise on her arm, talcum powder to her rash, and to assure that she rested adequately. Mrs. Richardson was then taken to her daughter's home and, a few days thereafter, to her granddaughter's home. After nine months of around-the-clock efforts by Ms. Bentley and her pre-adolescent children to provide the care they felt Mrs. Richardson needed, the latter died on April 2, 1979 from malnutrition and dehydration.

In August, 1978, the instant action was filed in Mrs. Richardson's name, in Cuyahoga County, Ohio Court of Common Pleas, Case No. 988159, alleging that she had been assaulted, battered, and negligently cared for by Abbey's staff, its Administrator (appellant Strauss), and her attending physician, Branimir Horvat, M.D.

The first trial of this case commenced in the Court of Common Pleas of Cuyahoga County, Ohio in

February, 1980. During the course of that trial, plaintiff stipulated that the entire cost of Mrs. Richardson's stay at Abbey and the major part of the health care expenses incurred due to her alleged injuries were paid for with Medicaid funds, provided under Title XIX of the Social Security Act (42 U.S.C. 1396, **et seq.**). This trial resulted in a jury verdict for plaintiff in the amount of $3,188.00. This verdict was appealed by both sides to the Ohio Eighth District Court of Appeals; Case Nos. 42156 and 42168. In reversing the judgment and remanding the case to the trial court for a new trial, the Court of Appeals premised its determination upon a multi-faceted denial to defendants of their due process right to a fair determination of the issues presented, including their right to equal protection of the law as one constituent of "due process". In that opinion, tne Court denied to defendants the benefit of the following common law rules, **inter alia:**

a) the rule requiring expert opinion testimony in cases involving the alleged negligence of a professional;

b) the rule rendering hearsay testimony, as to which no exception applies, incompetent as evidence to prove the truth of the matter asserted in the declarant's statement;

c) the rules requiring:

(i) medical opinion testimony on the issue of proximate causation between alleged negligence and claimed injury;

(ii) proof of the reasonableness of amounts claimed as special damages, medical in nature;

(iii) proof of physical or pecuniary harm as a required element on an assault claim;

(iv) proof of purposeful or intentional conduct as a predicate for submission to the jury of a claim for punitive damages;

(v) affirmance of an assignment of error presented, where the record failed to include a

transcript of all trial court proceedings pertinent thereto;

(vi) that a trial court's discretionary determinations not be disturbed upon appeal in the absence of an appellate finding of an abuse of such discretion; and

(vii) that a judgment of reversal not be entered where no prejudice to the appellant has been demonstrated.

The foregoing deprivations of equal protection of the laws by the Court of Appeals were promptly objected to through a Motion for Reconsideration, filed in the Appellate Court on July 20, 1981, which stated:

> Now comes the defendant, Abbey Nursing Home, Inc., by its attorneys and, pursuant to Rule No. 26 of the Ohio Rules of Appellate Procedure, and the 'Due Process Clause' of the Fourteenth Amendment to the United States Constitution (U.S. Const., Amend. XIV, §1), respectfully requests that this Honorable Court of Appeals reconsider its 'Journal Entry and Opinion' dated July 9, 1981 in the within appeals.

> In support of this application, defendant respectfully points out to the Court that the said 'Journal Entry and Opinion' is premised upon manifold jurisprudential irregularities which are so glaring and gross as to negate the possibility that same were produced by ordinary human error, simple inadvertence, or accidental misapprehension of the facts of record previously presented; by reason whereof, defendant's constitutional right to 'Due Process of Law' before this Court has been effectively denied. [Footnote omitted.]

After the Supreme Court of Ohio refused to take jurisdiction of a further appeal of this decision (Ohio Supreme Court Case Nos. 81-1453 and 81-1454, Motion to Certify overruled 11-25-81) [Appendix Exhibits J-M], the case was remanded to the Court of Common Pleas of Cuyahoga County, to be retried under the "law" as set forth in the Court of Appeals' opinion.

Upon such remand, and as a result of the discovery in the course of the first trial that a portion of the medical expenses claimed by plaintiff as special damages was paid for by Federal funds under Title XIX of the Social Security Act, defen-

dants filed, on January 7, 1982, a Motion for Partial Summary Judgment as to the issue of damages, raising plaintiff's and the Court's failure to follow the State statute implementing 42 U.S.C. §1396a (a)(25), which mandates that State welfare agencies receiving Title XIX funds be reimbursed for such funds expended as a result of acts of third-party tortfeasors. This motion was overruled on February 16, 1982. The necessity of applying Federal law to this case, and the failure of the trial court to do so, was repeatedly raised thereafter in defendants' tendered jury instructions; in their post-trial Motion for Judgment Notwithstanding the Verdict; and upon appeal — all to no avail. The courts of Ohio consistently refused to follow and to apply Federal law herein, despite the constitutional mandate to do so.

On June 18, 1982, this Court decided **Youngberg v. Romeo**, 457 U.S. 307, first published in 50 U.S. L.W. 4681. In that case, at 50 U.S.L.W. 4684-4685 [457 U.S. 321-323], this Court held:

'. . . It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made.' . . . In determining what is 'reasonable' . . . we emphasize that courts must show deference to the judgment exercised by a qualified professional. . . . Moreover, there certainly is no reason to think judges or juries are better qualified than appropriate professionals in making such decisions. . . . (Courts should not 'second guess the expert administrators on matters on which they are better informed.') For these reasons, the decision, if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such judgment. In an action for damages against a professional in his individual capacity, however, the professional will not be liable if he was unable to satisfy his normal professional standards because of budgetary constraints; in such a situation, good-faith immunity would bar liability.

* * *

By 'professional' decision-maker, we mean a person competent, whether by education, training or experience, to make the particular decision at issue. Long-term treatment decisions normally should be made by persons with degrees in medicine or nursing. . . . Of course, day-to-day

> decisions regarding care — including decisions that must be made without delay — necessarily will be made in many instances by employees without formal training but who are subject to the supervision of qualified persons. [Emphasis added.]

The foregoing rule of law enunciated by this Court was urged upon the trial court in defendants' Trial Brief, filed July 1, 1982, at pp. 6-7 thereof:

> In its decision herein, our Court of Appeals held that plaintiff's claims of professional negligence in providing decedent with allegedly substandard nursing care could properly be submitted to the jury in the absence of any expert's testimony as to (i) **what** the standard of care was, and (ii) whether defendant's conduct was in accordance with that standard. Such holding is, clearly, the law of this case for purposes of re-trial. On **June 18, 1982,** however, the United States Supreme Court held that proof of the specific standard of care in issue should be adduced in cases such as this, but also established a **presumption of the validity** (**i.e.,** correctness) of daily care decisions made by doctors and nurses for patients in long-term custodial care institutions. . . .
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> * * *
>
> **Youngberg v. Romeo,** ___ U.S. ___, ___ S. Ct. ___, ___ L.Ed. ___, 50 U.S.L.W. 4681, 4684-4685 (1982).

> The Supreme Court specifically included nursing judgments in the protected category of professional decisions. . . . [Emphasis in the original.]

However, the trial court chose not to apply the law as propounded by this Court, overruling a Motion for Directed Verdict made at the close of all of the evidence; which motion was squarely predicated upon plaintiff's failure to meet the evidentiary standards set forth in **Youngberg, supra.** (Transcript of the record, at pp. 1894-1896.) [Appendix, Exhibit I.]

Because the trial court chose to follow the "law of the case" as enunciated by the Ohio Eighth District Court of Appeals rather than the subsequent decision of this Court in **Youngberg**, no expert opinion evidence was offered of any specific duty defendants owed to plaintiff's decedent, breach of any such duty, or of the proximate cause of any of the injuries supposedly sustained by said decedent. Further, expert opinion testimony offered during defendants' case-in-chief on these

same issues, was excluded by the trial court on the basis that same was irrelevant. On this, and on numerous other issues, the trial court, as a result of its obedience to the Appellate Court's prior decision, as well as a marked predilection toward the plaintiff generally, acted to deny to the defendants their fundamental right to defend themselves in a manner consistent with the settled usages of the common law in Ohio.

In the re-trial, the jury returned a verdict against Petitioners for Seventy-Five Thousand Dollars ($75,000.00) compensatory damages, and Three Hundred Thousand Dollars ($300,000.00) as punitive damages. [**See**, Appendix, Exhibit H.] Following a remittitur of One Hundred Twenty-Five Thousand Dollars ($125,000.00) of the punitive damage award [**see**, Appendix, Exhibits F and G], Petitioners appealed to the Ohio Eighth District Court of Appeals, setting forth errors which were committed by the trial court which denied Petitioners a fair trial, including the issues raised herein.

Such errors were raised in Petitioners' Assignments of Error Nos. 1-10 and 12, filed April 21, 1983, and Petitioners' Assignments of Error Nos. 1-10 and 13, filed June 17, 1983. A divided Court of Appeals affirmed the judgment of the trial court. [**See**, Appendix, Exhibit E.] A Notice of Appeal as of right and a Memorandum in Support of Jurisdiction to the Ohio Supreme Court were filed, with the issues raised herein specifically set forth as error in Propositions of Law Nos. 3 and 4 in such Memorandum. (Ohio Supreme Court Case No. 84-264.)

Subsequently, upon the determination of a motion requesting the Court of Appeals to certify the case to the Ohio Supreme Court, and while the appeal to the Supreme Court was pending, the Ohio Court of Appeals, **sua sponte**, modified its opinion on the basis of "clerical error" by retracting a separate concurring opinion of one of the two Court of Appeals judges who voted for affirmance. [**See**,

Appendix, Exhibt D.] A second Notice of Appeal as of right to the Ohio Supreme Court was filed from the **nunc pro tunc** entry withdrawing such separate concurring opinion, with supporting Memorandum in Support of Jurisdiction, on May 1, 1984. (Ohio Supreme Court Case No. 84-711.) Thereafter, the Ohio Supreme Court, **sua sponte,** dismissed the first appeal "for the reason that no substantial constitutional question exists herein" (Ohio Supreme Court Case No. 84-264) [**see,** Appendix, Exhibit C], and a Motion for Rehearing in the Ohio Supreme Court was overruled. [**See,** Appendix, Exhibit B.]

On July 3, 1984, a Motion for Leave to Amend the Memorandum in Support of Jurisdiction in Ohio Supreme Court Case No. 84-711, seeking to incorporate into that appeal the Propositions of Law raised in 84-264, was filed. This motion was never ruled upon by the Ohio Supreme Court. On September 12, 1984, the Supreme Court of Ohio, **sua sponte,** dismissed the second appeal "for the reason that no

substantial constitutional question exists herein". [See, Appendix, Exhibit A.]

In this Petition, this Court is asked to reverse the judgment of the Court of Appeals on the grounds that:

a) same constitutes a violation of the Supremacy Clause of the United States Constitution;

b) same constitutes a denial to Petitioners of their right to a fair trial as guaranteed by the Due Process Clause and the Equal Protection Clause of the United States Constitution; and

c) same failed to apply the Law of the Land as clearly and explicitly set forth in a prior published decision of this Court, to the disparagement of the rights of Petitioners to a fair trial.

REASONS FOR GRANTING THE WRIT

A. Is it a violation of Article VI, Cl. 2, the "Supremacy Clause" of the Constitution of the United States, for a state, through its courts, to refuse to enforce Federal statutory law,

specifically the subrogation provisions of 42 U.S.C. §1396a(a)(25)(C), found in Title XIX of the Social Security Act, by refusing to give effect to the state statute carrying out the requirements of Federal law, in this case O.R.C. §5101.58?

The obligation imposed upon **state courts** by the Supremacy Clause to enforce Federal laws is absolute. **Claflin v. Houseman,** 93 U.S. 130, 137 (1876); **Testa v. Katt,** 330 U.S. 386, 391 (1947); **Lee v. Florida,** 392 U.S. 378 (1968). The assistance of a state court in the violation or "skirting" of a Federal law is equally prohibited, and no state legislature, state agency, or state court possesses the power to alter Federal social welfare legislation or regulations, or to fail to enforce same, without violating Article VI, Cl. 2 **Snider v. Creasy,** 548 F. Supp. 601 (D.C. Ohio 1982); **Terjesen v. Terjesen,** 420 So. 2d 704 (La. App. 1982).

In **Lee v. Florida**, this Court reversed a state court's refusal to enforce §605 of the Federal Communications Act, holding, at 385-386:

> But the decision we reach today is not based upon language and doctrinal symmetry alone. It is buttressed as well by the 'imperative of judicial integrity'. **Elkins v. United States**, 364 U.S. 206, 222. Under our Constitution, no court, state or federal, may serve as an accomplice in the willful transgression of 'the Laws of the United States', laws by which 'the Judges in every State [are] bound. . . .' [Footnotes omitted.]

And, in **Testa v. Katt**, the Court, in reversing the Rhode Island court's refusal to enforce §205(e) of the Emergency Price Control Act, stated, at 390-391:

> The opinion of a unanimous court in that case [**Claflin v. Houseman, supra**] was strongly buttressed by historic references and persuasive reasoning. It repudiated the assumption that federal laws can be considered by the states as though they were laws emanating from a foreign sovereign. Its teaching is that the Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon states, courts, and the people, 'any Thing in the Constitution or laws of any State to the Contrary

> notwithstanding'. It asserted that the obligation of states to enforce these federal laws is not lessened by reason of the form in which they are cast or the remedy which they provide. And the Court stated that 'If an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a State court.' **Id.** at 137. And see **United States v. Bank of New York,** 296 U.S. 463, 479. [Footnotes omitted.]

In the instant case, plaintiff included in her claim for recovery certain health care expenses, allegedly necessitated by her decedent's claimed injuries. However, the Ohio Department of Public Welfare and/or the Cuyahoga County Welfare Department — not decedent — paid substantially all of the costs of same through funds provided under the Medicaid program.

Defendants timely brought such fact to the attention of the trial court by their motion for partial summary judgment, and by their subsequent motion to dismiss for failure to join an indispensable party. Both motions were overruled. The

point was raised again in defendants' motion for judgment notwithstanding the verdict, which also was overruled. The trial court's actions in overruling these motions was clear error. More importantly, such refusal by the trial and appellate courts below to enforce a Federally-mandated right of subrogation not only constitutes a violation of Article VI, Cl. 2 of the United States Constitution, the "Supremacy Clause", but also jeopardizes Ohio's entitlement to receive any further Federal funding for its Medicaid program.

The Medicaid program, found in Title XIX of the Social Security Act, provides Federal funds on a matching basis to state public welfare programs which meet the requirements of the Act, for payment of the cost of medical services to the aged, indigent, disabled, and to dependent children. Subsection (C) of 42 U.S.C. §1396a(a)(25), which requires as a condition for receiving Federal funding, the states to "seek reimbursement for such assistance to the extent of such legal liability", **mandates**

that the states be subrogated to the plaintiff-recipient's claim, to the extent of medical assistance payments received. Thus, in order to receive such Federal matching funds, Ohio enacted O.R.C. §5101.58, entitled "Right of Subrogation", which provides, in pertinent part:

> No settlement, compromise, judgment, or award or any recovery in any action or claim by a recipient where the departments have a right of subrogation shall be made final without first giving the appropriate departments notice and a reasonable opportunity to perfect their rights of subrogation.

The passage by Congress of 42 U.S.C. §1396a(a)(25)(C) **required** the State of Ohio, as a condition precedent to the receipt of Medicaid funds, not only to **enact** R.C. §5101.58, but also to **enforce** it. The state and county welfare departments have an absolute **obligation** to make the effort to recover Medicaid funds expended from liable third-party tortfeasors; the alternative thereto being either: (a) a cutoff of Medicaid funds to the **entire** State of Ohio; or (b) acceptance of a legal

theory which permits Ohio to insist that it possesses a right to Medicaid funding by the Federal Government without first complying with the Federally-mandated prerequisites for receipt of same. The first of these alternatives has not yet occurred, but it may occur if the Ohio courts' orders refusing to enforce R.C. §5101.58 go unreversed.

The second alternative is clearly repugnant to Article VI, Cl. 2 of the Constitution of the United States.

The Congress of the United States, in furtherance of the salutary public policy protecting the limited resources of social welfare programs from being drained as the result of the acts of culpable third parties, has decreed that the state agencies spending those social welfare funds recoup same from such tortfeasors. While the Ohio Legislature has carried out its responsibility in enacting the necessary enabling legislation, the conduct of the courts of Ohio in this case has resulted in a judi-

cial nullification of both the Congressional mandate and the State-enacted enabling law. In order, therefore, that the "Supreme Law of the Land" continues to be recognized as such in Ohio, the actions of the Ohio courts in refusing to enforce 42 U.S.C. §1396a(a)(25)(C) must be reversed.

B. Is it a violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and, therefore, a denial of Due Process and of Equal Protection of the laws for the courts of a state, in a civil case, to deny a party thereto the benefit of those well-settled statutory and common law rules governing substantive proof and trial procedure which are ordinarily and regularly applied in similar disputes before such courts?

In the trial of any civil suit instituted to take a defendant's property (viz., money), said defendant is constitutionally entitled to the benefit of those well-settled statutory and common-law

rules governing substantive proof and trial procedure which are ordinarily and regularly applied in similar disputes before our courts, as opposed to being required to have the case against him determined under arbitrary and capricious concepts of "law" created on an **ad hoc** basis for the sole purpose of permitting jury "determination" of a legally-deficient claim.

This Court, in the case of **Chicago, Burlington & Quincy Railroad Co. v. Chicago**, 166 U.S. 226, 228, 234-235 (1897), stated:

> The questions presented on this writ of error relate to the jurisdiction of this court to reexamine the final judgment of the Supreme Court of Illinois, and **to certain rulings of the state court which, it is alleged, were in disregard of that part of the Fourteenth Amendment declaring that no State shall deprive any person of his property without due process of law, or deny the equal protection of the laws to any person within its jurisdiction.**
>
> * * *
>
> Nor is the contention that the railroad company has been deprived of its property without due process of law entirely met by the suggestion that it had due notice

of the proceedings for condemnation, appeared in court, and was admitted to make defense. It is true that this court has said that a trial in a court of justice according to the modes of proceeding applicable to such a case, secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice — the court having jurisdiction of the subject matter and of the parties, and the defendant having full opportunity to be heard -- met the requirement of due process of law. **United States v. Cruikshank**, 92 U.S. 542, 554; **Leeper v. Texas**, 139 U.S. 462,468. **But a State may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment.** In determining what is due process of law regard must be had to substance, not to form. This court, referring to the Fourteenth Amendment, has said: 'Can a State make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation.' **Davidson v. New Orleans**, 96 U.S. 97, 102. **The same question could be propounded, and the same answer should be made, in reference**

> to judicial proceedings inconsistent with the requirement of due process of law. If compensation for private property taken for public use is an essential element of due process of law as ordained by the Fourteenth Amendment, then the final judgment of a state court, under the authority of which the property is in fact taken, is to be deemed the act of the State within the meaning of that amendment.1/ [Emphasis added.]

The "Due Process" clause of the Federal Constitution (U.S. Const. Amend. XIV, §1) and the "due course of law" clause of the Ohio Constitution [Ohio Const. (1851) Art. I, §16] are analytically the same. 17 Ohio Jur. 3d **Constitutional Law** §649 at p. 184. And, according to the Ohio Supreme Court in **Hoel, supra,** at note 1, both of such constitutional provisions require that courts accord **all** litigants a resolution of their disputes **in**

1/ **Accord, Roberts v. New York City,** 295 U.S. 264, 277 (1935); **Chicago Junction Case,** 264 U.S. 258, 265 (1924); **Chambers v. Bureau of Unemployment Compensation,** 30 Ohio Op. 1 (Franklin Com. Pl. 1944), **aff'd.,** 146 Ohio St. 559 (1946); **Baltimore & O.R. Co. v. United States,** 5 F. Supp. 929 (N.D. Ohio 1933); **State ex rel. Hoel v. Brown,** 105 Ohio St. 479, 485-486 (1922).

accordance with the settled usage of the common law and "the regular and established course of judicial proceedings". Obviously, where, as here, a court violates any litigant's right to have such a proceeding, that litigant has not only been denied "due process", but also his right to the equal protection of those rules of state law which are regularly applied by our courts to similarly-situated litigants in like cases; for, "Equality of justice demands that in any controversy, the rights of all parties be scrupulously maintained."2/

Appellants' submit that the concept of due process in court proceedings necessarily incorporates the "equal protection" requirement that all litigants in like cases be accorded the same trial rights and procedures available in their jurisdiction. At page 1186 of **The Constitution of the United States of America, Analysis and Interpreta-**

2/ **LaFrance Co. v. Elec. Workers,** 108 Ohio St. 61, 95 (1923). **See also,** 17 Ohio Jur. 3d **Constitutional Law** §628 at p. 150.

tion, Legislative Reference Service, Library of Congress (U.S. Gov't. Printing Office, Wash. D.C. 1964), the principle is explained as follows:

> **Equality.** If due process is to be secured, the laws must operate alike upon all, and not subject the individual to the arbitrary exercise of governmental power unrestrained by established principles of private rights and distributive justice. Where a litigant has the benefit of a full and fair trial in the State courts, **and his rights are measured, not by laws made to affect him individually, but by general provisions of law applicable to all those in like condition,** he is not deprived of property without due process of law, even if he can be regarded as deprived of his property by an adverse result. [Emphasis added.]

Accord, 16A Am. Jur. 2d (Rev.) **Constitutional Law** §791 at pp. 931-933.

The record of the second trial herein reveals that defendants-appellants were repeatedly, systematically, and deliberately denied by the trial court of their rights to have the benefit of applicable rules of substantive and procedural law applied to them in the same manner to which all litigants in the courts of Ohio are entitled.

For example, the record of the re-trial in this cause reveals refusals by the trial court to:

(a) permit a verbatim stenographic record to be made of all of the trial proceedings;

(b) accord the parties' counsel reasonable opportunity to be heard in defense of their clients' rights;

(c) require plaintiff to establish as a fact, through the testimony of one or more experts in defendant's profession, the specific duties which defendant allegedly owed, and whether one or more of such duties was breached;

(d) permit defendants to adduce, through the testimony of experts in their professions, what the specific duties owed to plaintiff were, and that none of such duties was breached;

(e) permit a defendant, defending against a claim of liability premised upon the allegation that his servant battered plaintiff, to adduce evidence of such servant's good reputation for "peace and good order" in his defense;

(f) admit evidence proving that his adversary's witness had made a prior statement inconsistent with such witness's subsequent testimony at trial;

(g) permit a party to adduce relevant, probative evidence in support of his claim or defense; or

(h) charge the jury upon the issue of punitive damages that, in order to prevail upon such issue, plaintiff must prove that defendant's(s') alleged conduct must have been intentional and deliberate, or have the character of outrage frequently associated with crime.

Each of such refusals violates a well-settled, fundamental substantive or procedural right, established by statute, rule, or binding decisional precedent, which is routinely respected by courts of Ohio in civil cases. Yet, the appellate courts below — while unanimously agreeing that several of such constitutional rights violations occurred — refused to reverse the judgment so produced.

This Court has, on at least one previous occasion, taken the State of Ohio to task for such a wholesale denial of due process in an adjudicative proceeding. In **West Ohio Gas Co. v. Public Utilities Commission of Ohio**, 294 U.S. 63, 67-69 (1935), this Court stated:

> 1. The company made claim to an allowance for 'unaccounted for gas', which is gas lost as a result of leakage, condensation, expansion or contraction.
>
> * * *
>
> The company, basing its claim upon its proved experience, reported the average loss as 9% per annum. The Commission fixed the allowance at 7%, thereby reducing the operating expenses by $3,800 a year.
>
> * * *
>
> A public utility will not be permitted to include negligent or wasteful losses among its operating charges. The waste or negligence, however, must be established by evidence of one kind or another either direct or circumstantial. In all the pages of this record, there is neither a word nor a circumstance to charge the management with fault. **Cf. Ohio Utilities Co. v. Public Utilities Commission of Ohio**, 267 U.S. 359, 363.

> There is not even the shadow of a warning to the company that fault was imputed and that it must give evidence of care. **Without anything to suggest that there was such an issue in the case, the Commission struck off 2%; it might with as much reason have struck off 4 or 6. This was wholly arbitrary. Ohio Utilities Co. v. Public Utilities Commission of Ohio, supra.**
>
> Under the statutes of Ohio no provision is made for a review of the order of the Commission by a separate or independent suit. The sole method of review is by petition in error to the Ohio Supreme Court, which considers both the law and the facts. **Dayton P. & L. Co. v. P. U. Commission of Ohio,** 292 U.S. 290, 302; **Hocking Valley Ry. Co. v. Public Utilities Commission,** 100 Ohio St. 321, 326, 327; 126 N.E. 397. **To make such review adequate, the record must exhibit in some way the facts relied upon by the court to repel unimpeached evidence submitted for the company. If that were not so, a complainant would be helpless, for the inference would always be possible that the court and the Commission had drawn upon undisclosed sources of information unavailable to others. A hearing is not judicial, at least in any adequate sense, unless the evidence can be known.** [Emphasis added.]

Here, as in **West Ohio Gas Co., supra,** a series of wholly arbitrary denials of fundamental rights of appellants resulted in a constitutionally-

inadequate hearing. The record in this case presents this Court with the situation described in **Roberts v. New York City, supra,** at 277:

> To bring about a taking without due process of law by force of such judgment, the error must be gross and obvious, coming close to the boundary of arbitrary action.

The arbitrary action of the trial court in this case resulted in a judgment depriving appellants of $275,000 worth of their property without due process of law. This affront to our Constitution must not be permitted to stand unredressed.

C. Where this Court has decided that in cases seeking redress for alleged violations of an individual's liberty interest in safety in an institution supported by Federal funds, a decision regarding such safety, if made by a professional (which includes a person competent, whether by education, training or experience, to make the particular decision at issue) is

presumptively valid, and liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment, may a state court impose such liability withour first requiring proof of (a) the accepted professional judgment, practice, or standard, and (b) the departure therefrom?

In this case, plaintiff's decedent received residential nursing care and services in defendants' nursing home (which is a State-regulated industry[3/]); which care was paid for with Federal funds distributed under the Medicaid Act, 42 U.S.C. §1396, **et seq.**, through the Ohio and Cuyahoga County Welfare Departments. Plaintiff's claim in

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3/ **See**, Ohio Revised Code (Pages) Chapter 3721; Ohio Administrative Code, Ch. 3721.

this case is that the damages sustained by her decedent were caused by such care and services being provided in a substandard manner.

In the case of **Youngberg v. Romeo**, 457 U.S. 307, this Court, in deciding what a plaintiff, whose care in a state-supported institution was alleged to be substandard, must prove, held at pp. 321-323:

> We think the standard articulated by Chief Judge Seitz affords the necessary guidance and reflects the proper balance between the legitimate interests of the State and the rights of the involuntarily committed to reasonable conditions of safety and freedom from unreasonable restraints. He would have held that 'the Constitution only requires that the courts make certain that professional judgment in fact was exercised. It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made.' 644 F. 2d, at 178. Persons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish. **Cf. Estelle v. Gamble**, 429 U.S. 97, 104 (1976). At the same time, this standard is lower than the 'compelling' or 'substantial' necessity tests the Court of Appeals would require a state to

meet to justify use of restraints or conditions of less than absolute safety. We think this requirement would place an undue burden on the administration of institutions such as Pennhurst and also would restrict unnecessarily the exercise of professional judgment as to the needs of residents.

Moreover, we agree that respondent is entitled to minimally adequate training. In this case, the minimally adequate training required by the Constitution is such training as may be reasonable in light of respondent's liberty interests in safety and freedom from unreasonable restraints. In determining what is 'reasonable' -- in this and in any case presenting a claim for training by a state -- we emphasize that courts must show deference to the judgment exercised by a qualified professional. By so limiting judicial review of challenges to conditions in state institutions, interference by the federal judiciary with the internal operations of these institutions should be minimized.' **Moreover, there certainly is no reason to think judges or juries are better qualified than appropriate professionals in making such decisions.** See **Parham v. J. R.**, 442 U.S. 584, 607 (1979); **Bell v. Wolfish**, supra, 441 U.S. at 544 (**Courts should not 'second-guess the expert administrators on matters on which they are better informed.'**) **For these reasons, the decision, if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure**

> **from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.** In an action for damages against a professional in his individual capacity, however, the professional will not be liable if he was unable to satisfy his normal professional standards because of budgetary constraints; in such a situation, good-faith immunity would bar liability. See note 12, **supra.** [Emphasis added.]

And, in note 30 to the foregoing text, this Court held:

> By 'professional' decision-maker, we mean a person competent, whether by education, training or experience, to make the particular decision at issue. Long-term treatment decisions normally should be made by persons with degrees in medicine or nursing, or with appropriate training in areas such as psychology, physical therapy, or the care and training of the retarded. Of course, day-to-day decisions regarding care -- including decisions that must be made without delay -- necessarily will be made in many instances by employees without formal training, but who are subject to the supervision of qualified persons.

See also, Denny Jenkins v. United State of America, No. 82-1082 (D.D.C., filed April 28, 1983) at pp. 2-4. [Appendix, Exhibit T.]

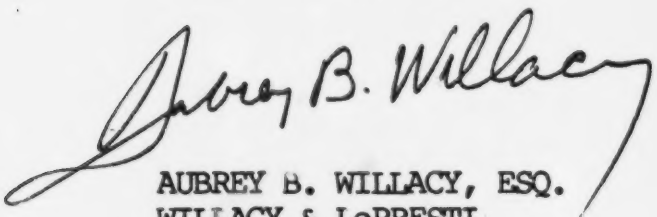
The decision in **Youngberg, supra,** was rendered by this Court during the pendency of the appeal from the first trial of this action. The rule set forth above from the case was brought to the attention of the trial court prior to the re-trial, and of every Ohio appellate court thereafter. The Ohio courts have uniformly refused, however, to give effect to this Court's decision in **Youngberg.** Rather, the Court of Appeals of Cuyahoga County, Ohio decided, in both appeals of this case, that no competent (**viz.,** expert) proof of a substantial departure from accepted professional judgment need be adduced in order to hold the professionals involved herein and their corporate employer liable in damages. Further, in the re-trial of this case, the defendants were not even permitted to introduce evidence of this nature to **defend** against the claim. This decision was affirmed on appeal. These rulings by the courts of Ohio, made after this Court announced its decision in **Youngberg, supra,** are in clear conflict with that decision.

The impact of such conflicting decisions will be to subject defendants, and similarly-regulated, Federally-supported facilities, to a wider scope of liability than this Court has heretofore determined to be permissible, with the accompanying potential for Federal funds, intended to purchase a minimal level of nursing services, being expended on damage awards. Such conflicting decisions of the courts of Ohio must be brought into line with the decisions of this Court.

CONCLUSION

Upon any or all of the foregoing reasons, Petitioners respectfully request that this Honorable Supreme Court grant a writ of **certiorari** to the Court of Appeals of Ohio, Eighth Appellate District, to review and decide the questions presented herein.

Respectfully submitted,



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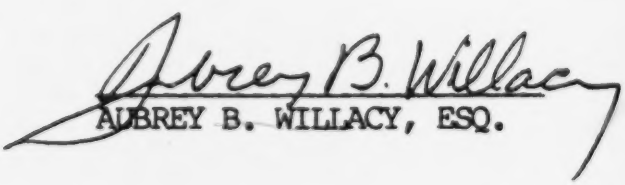
CERTIFICATE OF SERVICE

A copy of the foregoing **Petition for Writ of Certiorari** has been sent by regular U. S. Mail, postage prepaid, to Counsel for Respondent, Nicholas M. DeVito, Esq., Nicholas M. DeVito & Assoc., 1000 Terminal Tower, Cleveland, Ohio 44113, this 7th day of December, 1984.



AUBREY B. WILLACY, ESQ.